# SOME ACTUAL PROBLEMS OF PROFESSIONAL ETHICS.

THE books on professional ethics, with all deference be it said, deal somewhat inadequately with their theme. They do not solve the problems which, so far at least as my observation extends, most often present themselves for solution, and the problems which they do discuss are treated with hardly sufficient care in analysis. The law schools usually ignore the subject, and attorneys actively engaged in their profession follow such a diversity of theory and practice that in many matters of considerable moment and frequency there can hardly be said to be even a custom. The natural result of these conditions is that there is no well-defined professional standard to which attorneys can resort in cases of doubt, and therefore each attorney meets the questions which come to him — and they come to all — with only such light as an untrained instinct can supply. The need of a reasoned theory of a lawyer's duty, illustrated and made vivid by actual experiences, seems to me, therefore, to be not the least of the many needs of the time. It is in the hope of contributing something to the elucidation of one very extensive class of professional problems that I have written the following pages. It may be added that all the questions discussed and all the illustrations used have come to my attention in one way or another in the actual practice of my profession and may, I believe, be fairly taken as typical of the general experience of lawyers.

I may be pardoned a brief preliminary analysis of the relation between attorney and client: it is necessary both to the definition of the immediate subject of the article and also to the clear comprehension of the point I shall try to make.

The primal fact, then, upon which the relation of attorney and client is based is that on the one hand the lawyer seldom, if ever, undertakes to bring about a definite result, such, for example, as the attainment of a particular kind of relief in a particular litigation, but that on the other hand he does undertake to devote his best judgment to those matters which may be intrusted to him. Viewed from that standpoint, his undertaking falls into that large class of contracts which import what is called a fiduciary obligation. The receiver, the trustee, the guardian, the director, the

agent, the confidential secretary, in a word, the fiduciary of every character, whatever else he may promise, makes at least that pledge of his best judgment, and it is the confidence reposed in his judgment that gives both worth and dignity to his employment. Every fiduciary, therefore, should understand that when he allows his judgment to become impaired, he is not only committing a breach of contract, but he is committing a breach which involves in a peculiar and special degree his personal honor as a man who may be trusted.

Because the principal element of the fiduciary's employment lies in the pledge of his judgment, it follows that the principal temptations which he meets lie in those influences which tend to impair his judgment. These are legion and they range from strong drink to adverse interests. It is the adverse interest as affecting particularly the lawyer that I propose to consider in this article.

Before entering directly upon the subject, let me plead for its general importance. It is part of a larger subject of which the limits are not easily set. At any rate they far transcend the mere relation of lawyer and client and include the whole field of fiduciary employment in the community at large. The grosser forms of fiduciary wrongdoing, such as bribery, are well known and well understood, and are therefore to a considerable degree susceptible of prevention or remedy. In the subtler forms, however, which are not so well understood, and the effect of which is not so plainly visible, a great danger lies. Indeed, I hold it to be but a fair and moderate statement to say that the surrender of judgment by fiduciaries to interests adverse to their duty is the chief evil of our day. It is a commonplace of criminologists that the crimes of violence which characterized the elder ages have largely given way to crimes of fraud in the younger. It is not so clearly a commonplace, and in fact it will probably be questioned, and yet I believe it to be true, that what are usually regarded as crimes of fraud mainly consist, not in deceit, but in the breach of fiduciary contracts through the surrender to adverse interests.

The evil permeates all grades of society. Those transactions which we euphemistically term getting a rake-off, or making something on the side, or the like phrase, very usually involve it. The cook receives a rake-off from the butcher; the janitor gets a similar rake-off from the coal dealer; the insurance agent, who is the agent of the insured, gets his commission from the insurance company; the marine adjuster, who is supposed to be an impartial arbitrator of losses under marine insurance, makes a little on the

side from the shipowner whose losses he is supposed to determine; the purchasing agent gets a commission from those from whom he buys; the doctor shares in the profits of the druggist whom he recommends to his patients; the lawyer gets a rebate from certain corporations to whom he brings his clients' business: and so the list might be indefinitely extended. In the regions of great corporate transactions the same conflict between voluntarily assumed duties and adverse interests reappears, though often in far more complex and obscure forms. The familiar case of two corporations dealing with each other, with one or more directors common to both, presents it. The president of a great insurance company becomes a director of a bank which expects to extend favors to the company, and a big manufacturer or a shipper will get preferential rates from a railroad of which he happens to be a director. The frequent, we might almost say usual, custom of electing directors to represent a particular clique of interests instead of the stockholders as a body is a very subtle and not often recognized form of the evil. In general it is through the custom just alluded to that large incorporations are "controlled." In political life the surrender to adverse interests furnishes the great bulk of those crimes which we lump indiscriminately under the head of political corruption. The policeman, bound to protect the citizens at large, receives a little something for allowing some particular citizen to encroach upon the sidewalk; the police captain levies tribute for permission to maintain public nuisances, like houses of ill-fame; the city commissioner lets contracts to a friend of the boss; boodle aldermen grant street railway franchises; "hayseed legislators" introduce "strike bills;" even Presidents of the United States appoint fourth-class postmasters "for the good of the organization." Even into the realm of the administration of justice, the same corruption finds its way. For a very petty and contemptible form of it, witness the referee who accepts a portion of fees from the stenographer whom he appoints to take the testimony offered before him. A more serious matter is that judges who are to appoint referees are guided by political considerations and appoint men of their own party stripe, and the sight of courts dividing in political cases along political lines is altogether too familiar. In each and every case thus cited, analysis will disclose a fiduciary who has pledged his judgment to the service of one individual or group of individuals, but who has allowed it to be diverted to the service of others for the sake of some benefit, immediate or remote, accruing to himself.

A large element of the danger inherent in these practices lies in the complacency with which they are viewed by the community. To say nothing of laymen, even the courts are infected with it. In the actual administration of justice at the present time the equity rules, which were evolved in earlier and less sophisticated days, but which were, and are, wholly adequate to deal with these wrongs under whatever form they may present themselves, are too often distinguished or found inapplicable to the case at bar. Something of the old righteous indignation of the chancellors has passed out of our modern jurisprudence.

These preliminary illustrations and comments are quite irrelevant, but they will serve to emphasize a point of view which to my mind needs emphasis. Therefore I shall not apologize for them, but instead will examine in their light what may well prove to be the first occasion upon which a young lawyer will meet this form of temptation. When he searches a title, and comes to the question of insuring it, he will find the title companies promising him sums ranging from ten to twenty-five per cent. of their advertised charges in consideration of his bringing them the business. If he yields to temptation, the worst form that the transaction will take will be this: he will charge his client according to previous agreement a fixed sum, perhaps one per cent. of the purchase price of the property, as his fee, and in addition will require his client to pay his expenses; the latter will include the sums paid for insurance of the title; these being paid to him at the closing of the transaction, he will either pay the insurance company the full amount of their advertised charges, receiving back his percentage, or he will merely pay the difference between the two. In either case, his client, who knows nothing of the rebate (this we are entitled to assume as being the worst form of the case, and indeed it is likely to be true, except among those comparatively few landowners who have numerous transactions), will pay him the full amount of the company's charges upon his representation that he has paid them over in their entirety. This is a representation which is untrue in fact and which constitutes intentional deceit of the client.

In a milder form, the lawyer agrees to examine the title for a fixed sum, out of which he engages to defray all the incidental expenses, including the cost of insurance. In such a bargain the client of course understands that the lawyer will reduce his expenses to a mimimum in order that his profit may be a maximum. If the client knows of the rebate, the transaction is unexception-

able, of course; but if he does not know of it and supposes that the lawyer will have to pay the advertised charges in full, then the situation is that he has made a contract with his own trusted adviser in which he is ignorant of a material fact. Is the lawyer prepared to affirm that if the client had had full knowledge of the rebate, he would not have insisted upon getting some benefit from it himself? In spite of this possibility, almost all attorneys will argue that since, under the arrangement as actually made, the amount of profit which the lawyer is to make has been left by the client to the lawyer himself, it becomes of no concern to the client how great or how little that profit may prove to be. The argument might have force if the lawyer were dealing with his client as a merchant deals over the counter with his customer; but even so, an element enters into the transaction which it quite ignores. There is always a choice among insurance companies, and the client is entitled to be advised by his lawyer as to the one which, under all the circumstances of the case, will be most advantageous. This question may depend upon a variety of circumstances, the solvency of the company, its carefulness in the examination of titles, its courtesy in dealing with its customers, and many other matters which might be mentioned. The lawyer, however, will be influenced by the prospect of his fees, and that company will be most likely to deceive his patronage which pays him the largest rebate. Therefore the lawyer has put himself in the position of deciding his client's matters according to his own personal interests.

The practice of the title companies in this matter is so universal that it cannot be expected to change in a day; but this very circumstance will enable the lawyer, if he so desire, to turn it to honest ends. Let him inform his client at the outset that the rebate is proffered, and then, arranging for a fee that is satisfactory to both, promise either to pay the rebate over to the client or to credit it on the bill for services. If he is Quixotic in his honor and scorns to deceive even his tempter to deceit, he will disclose to the company the ultimate destiny of the rebate.

The question presented by this case is not by any means confined to title companies. The lawyer will meet it at every turn: public accountants will seek his patronage on a promise to divide their fees; auctioneers and brokers of all kinds will make him the same offer; lawyers in other jurisdictions who desire his foreign business will unite in the chorus; even trust companies, themselves fiduciaries, will ask him to procure their nomina-

tion as trustees in his clients' wills upon the assurance that they will continue to retain him as adviser in the affairs of the estate; and so it goes.

It will not be possible, if it were advisable, to enumerate all the forms in which this temptation comes. I will instance another, however, both because it is not uncommon, and because it involves a more complicated analysis. Lawyers are frequently appointed trustees in bankruptcy. Under such circumstances, in spite of their profession, it is eminently proper that they should retain counsel to advise them. They assume with the office important duties and liabilities which, because they intimately affect themselves as interested parties, it would be unsafe and unwise for them to assume without the aid of independent advice. Moreover, the administration of almost every bankrupt estate requires services which are quite without the pale of the trustee's duties and for which, if he should attempt to perform them himself, he could not obtain compensation. Whom, then, shall he retain as his counsel?

It frequently happens in these proceedings that one attorney represents a majority of creditors and is therefore in a position to dictate the appointment of the trustee, Suppose that under such circumstances he offers the post to some legal friend provided he be himself retained as attorney. Now, in considering this offer the proposed trustee must remember that his judgment will be pledged to the service of all the creditors alike and indeed, what in actual practice is too often forgotten, that he will become a fiduciary for the bankrupt himself. If the estate should by any chance prove more than sufficient to pay all the creditors in full, it would be his duty to restore the surplus to the bankrupt, and in all cases it will be his direct duty to the bankrupt to see that the estate realizes as much as possible. Among these various beneficiaries of his trust, the interests of the different parties may well prove to be strongly antagonistic, and it will become his duty to preserve among all these contending interests the even balance of the strictest impartiality. Under such circumstances to employ the attorney for particular creditors and to follow his advice may be to take action which will benefit some creditors at the expense of the others. For a not uncommon illustrative example, let us suppose that on the eve of his bankruptcy the bankrupt has made large purchases of goods on credit. Under ordinary circumstances the merchants who sold the goods would come in as simple creditors; but suppose, further, that the bankrupt had made immediate sales

of these self-same goods over to some third persons, partly for cash and partly for credit, and, pocketing the cash, had left the outstanding credits as assets of his estate. Under the latter supposition, it is almost inevitable that the merchants who originally sold the goods will seek to have the sales set aside and to recover the goods, even from the hands of the third parties, on the ground of fraud on the part of the bankrupt in misrepresenting his financial condition. On the other hand, it would be quite likely that it would be for the interest of the creditors at large to have the trustee defend the transaction and collect the unpaid balance still owing from the last vendees. In any event, the question is obviously to be determined only after careful inquiry ; and to follow the advice of an attorney who is interested by reason of his prior retainer to secure a particular decision of it is, with equal obviousness, to be recreant to the creditors at large. In general, therefore, an offer such as we have supposed should be looked at askance, and should not under any circumstances be accepted without a full disclosure of the facts to the court or referee in charge of the proceedings and, if possible, to the creditors.

If the trustee is a member of a firm of lawyers, should he retain his own partner, and if so, should the partner turn his fees into the partnership fund, so that the trustee will receive his share of them? The principle involved in these questions is not confined to the matter of bankruptcy : it extends to every case in which the lawyer is an executor, trustee, guardian, receiver, or other fiduciary in which he himself requires legal advice.

Of course, when a fiduciary seeks advice he is, by virtue of his obligation, in duty bound to secure the best advice. This does not mean that he is to retain the leader of the bar in every trivial matter ; but it does mean that he is to exercise his best judgment on all the considerations involved in the choice. Now the partnership relation in itself involves great personal confidence and esteem among the associates, and so it will usually happen that the lawyer to whom the trustee would most naturally turn would be his own partner. Consequently, if the trustee does in fact possess that trust, it is entirely proper that he should retain his partner : there is nothing in the partnership relation inconsistent with his obligation as trustee.

With the question of sharing in his partner's fees, however, very different considerations arise. If we assume that if it were not for the fees the trustee would retain somebody else, we have a clear case of a judgment swerved from its duty by pecuniary

considerations. But suppose the trustee insists that he would retain his partner in any event, whether he shared in the fees or not, and that therefore in accepting them he does not violate the obligation to use his best judgment in the slightest degree. Does he not in that case live up to the very letter and spirit of his obligation?

I am far from having the hardihood to deny that a trustee may sometimes say to himself in all human certainty that his judgment would have been the same, fees or no fees. Human experience, however, has evolved a theory of inferences known as the burden of proof. Succinctly stated, it is that under some circumstances the inference from given facts is so strong that it will be assumed to be true unless it can be proved to be untrue. The theory is known to every lawyer: it is used in every trial. It far transcends the narrow confines of the courtroom, however. It enters into every relation of life and in particular it has become a rule of conduct. As such it means that the honest man will not put himself into an ambiguous position, a position, that is to say, where the probable inference will be derogatory to his character, even though it be not justified in fact. When it is applied to lawyers, it becomes the rule that the lawyer's fidelity to his client's cause should be, like Cæsar's wife, above suspicion. In this view, the lawyer who carries the confidence of his clients as a precious trust and who is unwilling that it should be compelled to draw upon itself in order to acquit him of suspicion, will not, in the supposed case, share in his partner's fees. He will refuse to put himself in that ambiguous position.

There is one case which may present difficulties to the conscientious lawyer and that is the case where the client himself puts him in a position to be tempted. For example, when the owner of land applies for a loan and offers a mortgage as security, the proposed lender naturally requires the title to be first examined by his own attorney, and also requires the expenses of the examination to be borne by the applicant. Hence has arisen the universal custom that the lawyer for the mortgagee examines the title and that his fees are paid by the mortgagor. Now if, as often happens, the matter of lending the money is also confided to the lawyer, the fees for examining the title may become a consideration in the matter of lending the money, and the lawyer may find himself tempted, as between two proposed loans, to regard the worse as the better security, because it carries with it the larger fee. Under such circumstances, he can only do his best: if possible,

let him talk it over with his client, for there, as always, he will find the surest refuge. Above all, let him not complacently regard himself as temptation-proof. If he does, he will run counter to the unbroken experience of the ages, and will assume in himself a supra-human strength which has often been imagined but never realized. The greater his real power to resist, the more frankly will he acknowledge the power of the temptation.

Hitherto we have looked only at the lawyer who is to be paid by the adverse party; but in many of the instances which we have supposed it will be noticed that the adverse party is himself a lawyer, and consequently we must consider the ethics of his position. If, for example, it is not right for a lawyer to share in the fees which he is to pay his legal correspondent in another jurisdiction, what is to be said of the correspondent who offers to share them? The wrong of receiving lies, as we have seen, in the breach of the lawyer's contract to devote his impartial judgment to his client's service; but the lawyer who pays, not having made that contract, cannot commit a breach of it. What he does do, however, so far as he does anything, is to offer the inducement to a breach.

There is a large class of cases in which one person induces another to commit a breach of a contract to which he is not himself a party. They have never, so far as I am aware, at least in our jurisprudence, been correlated under one title, and indeed the nature of the wrong, and even whether or not it is a wrong, has at times been deemed, singularly enough, a doubtful question. The substantive law, however, although not wholly satisfactory, has not been quite so lax as might possibly have been expected, and has as a matter of fact in most cases worked out a remedy, even though it has been deficient in theory. For example, when the one who owes the duty is a public servant, and the offending party offers him a valuable consideration, the criminal law will step in with an indictment for bribery. When the contract is marital and a third person induces one of the parties to violate it, the civil law will afford the remedy, such as it is, of an action for alienation of affection. If one entice away my servant, I may have an action against him for loss of services. If A agree to sing at my theatre, and B, knowing of that agreement, induce her to sing at his, I may enjoin both A and B. If A contract to sell me a specific parcel of land, and B, knowing of that contract, induce A to sell it to him, I may by bill in equity compel B to reconvey it to me. And so the list might be extended indefinitely, but the underlying principle is one and the same in all these cases, that one man has no

right to induce another to default in his duties to a third, and that the wrong will, if possible, be prevented, undone, or punished. That what is thus a wrong at law is a wrong in ethics, too, will hardly be denied. That, then, is the ethical judgment which we must pass on the lawyer who offers to share his fees in consideration of receiving the business. We must, of course, pass the same judgment on title companies, trust companies, accountants, and the other gentry whom we have found following these customs.

There are tendencies involved in the practices of which I have complained which, over and above the injury to the client, react injuriously both on the lawyer and on his tempter. Let me illustrate by an example drawn from another profession. The custom is universal that an insurance broker shall receive his compensation from the insurance company in the form of a percentage of the insurance premiums, and yet he is supposed to be the agent of the insured and not of the company. In other words, he has pledged his judgment to the service of the insured, he has made his acts and representations the acts and representations of the insured, and his compensation comes from the insurer. We have thus on a large scale a profession which owes its duty in one direction and receives its compensation from another, and consequently a profession whose interest conflicts throughout with its duty. How large a proportion of the difficulties which surround the insurance business and which affect both the insurance companies and the insured is due to this anomalous position of the broker is perhaps difficult to say; but that it is very large nobody, least of all the companies, will deny. Both brokers and companies are restless under the practice. I may point out the effect of the anomaly on the brokers themselves. The business, instead of being one of confidence and trust, as the business of an agent should be, has become a business of mere rate-cutting and, anomaly of anomalies, of paying back to the insured a percentage of the commission received from the insurer. Brokers even go so far as to attempt by agreement to regulate the percentage of that re-rebate, so to speak, and one of their serious difficulties is created by those brokers who break the agreement. I have had a broker complain to me that the insured was no longer loyal to the broker, but was governed solely by the question of his premiums; but the reason is obvious: the broker long since ceased to be loyal to his client, and can hardly expect his client to be loyal to him. Perhaps the most prominent of all the effects, however, is the ill name attached to the profession and the lowering of quality in the *personnel* of its followers.

I believe something of the same effect may be traced into the profession of the law through the extension of similar methods. It is a frequent observation that the practice of the law is taking on, especially in the large cities, a distinctly commercial character. I believe this matter of rebates and rake-offs has something to do with the change. Clients are not wholly ignorant of these things, and just in proportion to the increase in their knowledge is the decrease in their confidence. Then follows the commercialization of the relation, the lowered standards and *personnel.*

Out of all these considerations and analyses we may evolve a practical rule which lawyers can prescribe to themselves as a rule of thumb to govern their relations with their clients. It must be taken as a rule of thumb only, that is to say, only as a practical, offhand method of deciding doubtful points. It must not be allowed to take the place of a clear understanding of the back-lying reason. That, of course, in the ultimate analysis is the only criterion, and only the lawyer who grasps the fact that he has pledged his judgment to the service of his client and must keep it unimpaired and in training, so to speak, has the real substance of the matter, or the real guard against disloyalty. The rule of thumb, however, is this: —

*If possible, do not receive any compensation in your client's business, except from your client himself; but if circumstances compel you to break the rule, tell your client what you receive.*

The significance of the second clause perhaps needs explanation. The lawyer is often tempted to think that after all it is none of his client's business how much he has received. When that happens, he may be sure of three things: he may be sure, in the first place, that it is his client's business; he may be sure, in the second place, that he is afraid to tell his client; and he may be sure, in the third place, that he is engaged in the pleasing, but futile, process of self-deception in trying to suppress a consciousness of unfaithfulness which will not be suppressed. The willingness to tell his client how much he has received will therefore serve as a very effective practical test of his own courage and loyalty.

This whole discussion may be summed up in a few words: let the lawyer remember that he is the recipient of a personal trust of which he may be justly proud, and, so remembering, let him be animated by that spirit which in all ages and in all climes, among savage and civilized races alike, has been the distinguishing mark of the gentleman — scorn to betray a trust for profit.

*Everett V. Abbot.*

NEW YORK, March 11, 1902.